APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF IDAHO

No. 8339

J. J. NEWBERRY COMPANY, a corporation,
Plaintiff-Respondent,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a Labor Organization; ROBERT LENAGHEN; LORA DENKERS; MEL SIMPSON, *Defendants-Appellants*

Rehearing Denied July 2, 1956.

KEETON, Justice.

J. J. Newberry Company, a corporation, respondent here, will hereinafter be referred to as Newberry. Retail Clerks International Association, Local No. 560, a Labor Organization, Robert Lenaghen, Lora Denkers and Mel Simpson, appellants, will hereinafter be referred to as the Union.

In 1952 the Union claimed a majority representation of the employees of Newberry's store in Pocatello, and filed a petition for an election with the National Labor Relations Board, pursuant to congressional enactments and procedure, to which election Newberry consented. The purpose of the election was to permit Newberry's employees to vote as to whether they desired the Union to act as their bargaining agent. The election was scheduled for August 13, 1952. August 12 some of the employees of Newberry informed Mr. Lenaghen, secretary and treasurer of the Union, that none of the employees of Newberry would attend the meeting and none would vote for the Union. The Union then withdrew its request for an election.

Thereafter on August 13, 1952, the Union filed charges against Newberry before the National Labor Relations Board claiming unfair labor practices. The charge alleged in substance that the Union on and after June 23, 1952,

represented a majority of Newberry's employees and that Newberry had refused to bargain with the Union and had dealt directly with the employees on the subject of wages and other conditions of employment without giving the Union's representatives an opportunity to be present; that Newberry had refused to recognize the Union as the exclusive representative or bargaining agent of Newberry's employees and had committed unfair labor practices in violation of Sec. 8 (a) (1) and (5) of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C.A. 158 (a) (1, 5). Newberry denied the commission of the acts complained of.

Hearing on the charge and the Regional Director's complaint made pursuant thereto was held in Pocatello January 13, 1953. The trial examiner found on all issues in favor of Newberry, and specifically found that Newberry did not interfere with, restrain or coerce its employees within the meaning of the National Labor Relations Act, and recommended that the complaint be dismissed in its entirety. The National Labor Relations Board approved the findings and recommendation of the examiner and dismissed the proceedings March 25, 1953.

At a meeting of the Executive Council of the Union held in March, 1953, respondent Lenaghen was directed to place a picket in front of Newberry's store in Pocatello.

The Union then placed a picket to patrol the outside of the sidewalk at the entrance and in front of Newberry's store, carrying a sign which read:

"Members & Friends
of Organized Labor
We Need Your Help
Please Shop At the Stores
That Display This Sign
(facsimile of Union store card or emblem)
Our Members
Do Not Patronize
Newberry's
Retail Clerks Union
Local #560."

At the same time Newberry was placed on the Union's unfair list. Such picketing continued to and including April 8, 1953, at which time Newberry filed a complaint in the district court praying for a restraining order. The Honorable W. C. Loofbourrow, District Judge, issued an order directing the Union to show cause why an injunction pendente lite should not be granted. Picketing pending the hearing was enjoined. Further hearings on the matter were referred to the Honorable Hugh A. Baker by order of the Court.

The Union appeared as directed and filed a motion to quash, and set aside the temporary restraining order, in which motion it contended the restraining order contravenes the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9 and 10 of the Constitution of Idaho, and further that the court was without jurisdiction in the matter for the alleged reason that the matter complained of had been pre-empted by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. 141 et. seq.

The motion to quash was heard, and on March 31, 1953, the court entered an order denying the motion and enjoined the Union, pending the action and until final determination thereof, from picketing Newberry's business or interfering with prospective patrons, or placing Newberry on its unfair list.

Thereafter the Union filed an amended answer to Newberry's amended complaint.

On issues joined, trial was held in April, 1954, and the court thereafter made findings of fact and conclusions of law and entered judgment favorable to Newberry.

The trial court, among other findings found:

"VI.

"That at all times since August 13, 1952, and at the time of, and during the picketing set forth above, the said union did not have the contractual right to, nor did it act for or in behalf of plaintiff's employees and did not act at the instance of, request of, or approval of said plaintiff's employees; that said picket was placed by said defendants, without the knowledge of plaintiff's employees and without any authority from plaintiff's employees or any of them.

"VII.

"That at no time did the defendant union, or any of its representatives or agents, present to or discuss with plaintiff, a contract or proposed agreement.

"VIII.

"That at no time was there a dispute or controversy between the employer and its employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.

"IX.

"That the purpose of placing said picket by the defendant union was unlawfully to intimidate, coerce and compel plaintiff to enter into an agreement with defendant union, and by the use of economic coercion by defendants, to destroy plaintiff's freedom of contracting.

"XI.

"That in addition to placing the picket, and for the same purposes, defendants secured the placement of the plaintiff on the 'unfair list' of Retail Clerks International Association, Local No. 560, Pocatello Building Trades Council, and Pocatello Central Labor Union."

By the terms of the judgment the Union, its officer, members, agents, servants and all persons acting in aid of or in conjunction with them or any of them were permanently enjoined from picketing Newberry's place of business. From the judgment and an order denying a new trial the Union appealed.

In assignments of error the Union contends: First, that the court erred in holding that it has power and authority to hear and determine the issues for the alleged reason that Newberry had failed and neglected to exhaust remedies available before the National Labor Relations Board pursuant to 61 Stat. 136, 29 U.S.C.A. §§ 141 et seq., 151 et seq.;

Second, that the trial court usurped power and authority of the Federal National Relations Board to process, hear and determine the grievances and subject matter set out in plaintiff's amended complaint and the evidence offered in support thereof;

Third, the Union challenges the jurisdiction of the trial court to decide the issues for reasons set forth in assignments 1 and 2;

Fourth, that the conduct complained of was and is the lawful exercise of freedom of speech and the press, protected by the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9, 10, and 13 of the Constitution of Idaho;

Fifth, that the trial court's decision is contrary to and is forbidden by Sec. 44-703, I.C.;

Sixth, that the trial court failed to designate and define or describe an employing unit in his findings.

Assignments of error 7, 8, 9, and 10 challenge the jurisdiction of the court, the general contention being that a labor dispute existed which is exclusively to be heard and determined by the National Labor Relations Board.

Assignment of error 11 claims the court erred in denying a motion for a new trial on substantially the same grounds as are set forth in the assignments of error and contentions of the Union overlap and the same general proposition advanced in one is covered by others.

In points and authorities to sustain the above assignments of error the Union contends that Newberry should have exhausted its remedy before the National Labor Relations Board pursuant to 29 U.S.C.A. § 160, Labor Management Relations Act, commonly known as the Taft-Hartley Law; that the jurisdiction of the state court to hear and determine the cause has been superseded and pre-empted by an Act of the United States Congress, 29 U.S.C.A. § 151 et seq.; that Sec. 44-703, I.C. prohibits the issuing of the injunction; that the complained of picketing, publicity and advertising activities of the Union are constitutionally guaranteed.

Basically the contentions and assignments of error present for decision the question of the jurisdiction of the court to hear and determine the matter and the protection that is afforded the Union by the provisions of the United States and State Constitutions guaranteeing freedom of speech and of the press.

(1) That National Labor Relations Act as amended by the Taft-Hartley Law, 61 Stat. 136, Ch. 120-29 U.S.C.A. § .... et seq., regulating labor relations affecting commerce, is specifically limited to a labor dispute and also one that affects commerce.

29 U.S.C.A. § 142 defines the subject matter regulated by the Congressional Act in words as follows:

> "When used in this chapter—
>
> "(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

The Labor Relations Act, 29 U.S.C.A. § 152 (9) defines a labor dispute as:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

By the definitions above quoted the activities of the Union here complained of are not specified and do not come within the Congressional enactments covering labor practices or labor disputes affecting interstate commerce.

Whether Congress has foreclosed state regulations in all cases where a labor dispute exists and interstate commerce is involved is not presented for determination.

The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein. Hence the Union cannot successfully attack the jurisdiction of state courts on the ground that Newberry failed to exhaust administrative or judicial remedies available under the Labor Management Relations Act, or that the activities complained of have pre-empted or covered in the anti-injunction act, 47 U.S. Stat. at Large, 70, 29 U.S.C.A. §§ 101 to 115, or the National Labor Relations Act, 29 U.S.C.A. §§ 151 to 168 inclusive. Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 269 Wis. 338, 69 N.W. 2d 762; General Building Contractors' Ass'n. v. Local Unions, 370 Pa. 73, 87 A. 2d 250, 32 A.L.R. 2d 822; International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651; G., H. & E. Freydberg, Inc. v. International Ladies' Garment Workers, Sup., 128 N.Y.S. 2d 470; International Molders and Foundry Workers' Union v. Texas Foundries, Tex. Civ. App. 241

S.W. 2d 213; Elle v. Pocatello Bldg. & Const. Trades Council, and Simplot v. Pocatello Bldg. & Constr. Trades Council, Idaho, 297 P. 2d 519.

Cases cited by the Union purporting to express a contrary view covering situations coming within the provisions of the Labor Management Relations Act, 29 U.S.C.A. §§ 141 et seq., 151 et seq. are not in conflict with the views herein expressed. Further the Union had already had a hearing before the National Labor Relations Board and on issues presented, the Board determined the controversy favorable to Newberry.

No administrative or judicial remedies covering the present situation are provided in the Congressional enactments above cited and the contention that Newberry should have exhausted such remedies is not sustainable. Further, if the Congressional enactments covering labor disputes were applicable, such remedies would have been futile. Before the machinery could have been put in operation the wrong complained of and prohibited by the injunction would have been accomplished.

The contention of the Union that the injunction issued in this case is in violation of and forbidden by subd. (e) of Sec. 44-703, I.C., is without merit.

(2, 3) There was no labor dispute existing between Newberry and its employees, or any of them. The restriction on issuing an injunction in certain cases specified in said Section 44-703, I.C. without following a specified procedure refers to a controversy between the employees and employer. In the present situation the Union represented none of Newberry's employees, none desired Union representation, and none of such employees took any part in the picketing of the Newberry store. There being no labor dispute as defined by Sec. 44-712, I.C., the said statute, Sec. 44-703, I.C., has no application to the situation, and the trial court's jurisdiction was not limited or restricted. Elle v. Pocatello Bldg., & Const. Trades Council, supra, and

Simplot v. Pocatello Bldg. and Const. Trades Council, supra.

The Union contends that the advertisements and picketing complained of were a proper exercise of freedom of speech and of the press permitted by the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9, 10 and 13 of the Idaho Constitution.

(4-6) The trial court correctly found that the picketing was for an unlawful purpose, i. e., for the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the Union and to destroy Newberry's freedom of contracting. The constitutional provisions above cited do not prevent or prohibit the affording of appropriate remedies for the abuse of the constitutional guaranties. Robison v. Hotel & Restaurant Employees Local No. 782, 35 Idaho 418, 207 P. 132, 27 A.L.R. 642; Elle v. Pocatello Bldg. & Const. Trades Council, supra, and Simplot v. Pocatello Bldg. & Const. Trades Council, supra. Picketing and advertising for an unlawful purpose are subject to injunctive relief. Tarr v. Amalgamated Ass'n, etc., 73 Idaho 223, 250 P. 2d 904.

(7) The contention of the Union that the trial court failed to define or describe an employing unit is of no materiality. The Union attempted, without authority, to represent employees of Newberry's Pocatello store. The employing unit of the one store presented the only issue. The election to be held August 13, 1952, covered only the employees of the one unit and the charges made before the National Labor Relations Board applied to the same business. There was no showing that other businesses were in any wise involved and the Union is not in a position to complain that an employing unit was not defined.

The right to engage in business or follow any lawful calling is a right open to all persons, together with the further right to conduct such business or calling without unlawful interference from others.

The motion for a new trial was properly denied. Judgment is affirmed. Costs to respondent.

TAYLOR, C. J., ANDERSON and SMITH, JJ., and BECKWITH, District Judge, concur.

APPENDIX B

TITLE OF COURT AND CAUSE:

MEMORANDUM OF DECISION

The major facts are set forth in the memorandum of decision of August 19, 1953, on the order to show cause and motion to dissolve the restraining order. I shall not restate fully but some restatements or additions seem to be warranted. I shall not cite the specific cases or quote the provisions of the Federal statutes which to my mind support the conclusions reached. All are cited in briefs of counsel.

Defendant union appears still to assert a majority representation subsequent to August 13, 1952, the date upon which the election was to have been held, to and including the date upon which the picket was established in March, 1953. The facts which should have indicated to the union before August 13, 1952, that a majority of plaintiff's employees did not desire to be represented by the defendant union are detailed in the memorandum of August 19, 1953. The election scheduled for August 13th, 1952, was of plaintiff's qualified employees; the question to be answered was whether the defendant union was to represent them. Before that date the defendant was informed that no employee would vote or vote favorably. The union did not choose to hold an election when faced with the certainty of defendant so cancelled the election. On about the same day the union filed with the National Labor Relations Board a complaint alleging, as I understand the record, that the plaintiff had "dissipated" the union's majority. To my mind the charge itself involved at least the following: First,

The assertion that by action of the employees the union had obtained the right of representation; second, a most solemn declaration that it had lost and no longer enjoyed that right; and, third, a charge that it had suffered the loss through interference by the plaintiff. The decision of the board was not favorable to the union. The evidence discloses that not a single employee of the plaintiff signed a representation agreement or application for membership or had anything to do with the union after August 13th. It is difficult for me to see how the union can persist as it does in its assertion of majority representation. If the union represented after August 13, 1952, any of plaintiff's employees through their choice or with their consent it was of a very small minority. The union's activity after August 13, 1952, was on its initiative and not at the instance or request or with the approval of plaintiff's employees.

In their briefs counsel for the defendants several times refer to the fact that the manager of plaintiff's store at Pocatello, shortly after the conversation between him and Mr. Lenaghen regarding representation or representation contract, obtained a copy of the union contract and union wage scale in a similar business at Pocatello and promptly caused plaintiff's wage scale to conform to it and, so far as the record discloses, also brought all working conditions up to the union standard. I am unable to see how this fact can be of particular aid to the defendants or how it can of itself confer upon them the right to picket or in any manner affect that right. This circumstance undoubtedly gave substantial comfort to the union in that it justified at least a right to suspect that union activity had been effective even in non-union stores. But unjust enrichment or quantum meruit seems to have no place in the case.

Nor can I see how or why the fact that the defendants in August, 1952, established a picket is of importance. The two picketings were in no manner connected, the second was not a continuation of the first. The first picketing ended months before the second began. Relationship of

the parties were not identical. The circumstances preceding and connected with the second picketing more strongly indicates a coercive purpose than the first.

The defendants renew and vehemently advance the position they took on the hearing on the order to show cause and to dissolve that Congress, by enacting the several labor laws relating to businesses engaged in commerce, had assumed a Federal jurisdiction over controversies of this character and had given the National Labor Relations Board an exclusive jurisdiction, that plaintiff's sole remedy is by resort to the Board and that the state court is without right to take notice of the controversy or to proceed. It was my decision on the order to show cause and the motion to dissolve that jurisdiction of the Board over charges against labor organizations exists and is exclusive only when the charge amounts to an unfair labor practice as defined in the Federal statute and that where the charge is not one condemned by Congressional Act there is no limitation on the right of a state or its courts to take notice of the controversy. To my mind the controlling authorities support that decision.

I am not convinced that counsel for the defendants actually disagree with that conclusion. A careful reading of their briefs indicates their final position is not accurately set forth in some of the broad statements made in their briefs. While there is no express admission by counsel there seems to be a recognition of the principle that the Board has jurisdiction only when an unfair labor practice is involved and unless so involved the state courts may take notice of, hear and decide the controversy as state law, written or common, seems to require. Counsels' argument seems to be based upon a premise that the case actually involves a charge of unfair labor practice.

The defendants insist that the picketing was either the innocent and unactionable exercise by them of their right freely to speak or was for the improper purpose coercively

of bringing about membership in the defendant union of all of plaintiff's eligible employees. They assert that if the picketing was solely for the purpose of imparting information, no cause of action, despite resulting damage, can be based upon or grown out of the exercise of their guaranteed right of free speech; also that if the purpose of the picketing was directly or indirectly through the plaintiff, to coerce membership in the union by plaintiff's employees an unfair labor practice is established over which the National Labor Relations Board has complete, and this court is without, jurisdiction and must cease to take notice of the controversy. If the picketing can have no other purpose, the conclusion of defendant's counsel appears to be correct.

At the time of the hearing on the order to show cause and the motion to dissolve no pleading on behalf of the defendants setting forth their purpose in picketing was on file. No definite issue of fact was made by the pleadings and no general limitation or restriction of the right to testify or nature of the inquiry was imposed. Mr. Lenaghan and Mrs. Denkers testified in substance that the picket was established solely for the purpose of informing union members and friends that the plaintiff was operating a non-union store and not for the purpose of influencing anyone to refrain from visiting or purchasing at plaintiff's store. But it seemed fair to assume from Mr. Lenaghan's testimony that he expected the plaintiff to sustain a financial loss through the picketing. The circumstances antecedent to and connected with the picketing caused me to believe and to decide that the picketing had a purpose or aim other than merely to give information, was in fact and was intended to be coercive in character or sufficiently indicative of coercion and improper purpose to warrant injunction pendente lite.

Following that decision a formal answer subsequently supplanted by amended answer, was filed. In the answer we have for the first time a declaration by the defend-

ant of the purpose of the picketing. In the amended answer the defendants deny all purpose of coercion and allege:

> "* * * defendants aver that such advertising and picketing initiated and caused by the defendant labor organization was for the proper and lawful purpose of communicating information to and apprising members of the defendant labor organization and other members of organized labor affiliated therewith, that plaintiff did not display the Union Store Card, that plaintiff was unfair to organized labor and that there were other stores in Pocatello, Idaho, that displayed the Union Store Card * * *
>
> "* * * these defendants aver that the intention and purpose of these defendants in so initiating and placing such picket advertising was to avoid the disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor and their affiliates and friends in Pocatello city and vicinity, and to support, protect and maintain such established, prevailing hours, wages and other conditions of employment"

On the trial on the merits Mr. Lenaghan and Mrs. Denkers testified that the union concluded to organize the "soft goods" businesses in Pocatello, decided to "concentrate" on Newberrys and established the picket for the purpose of diverting business from the plaintiff to stores displaying the Union Store Card. To my mind such testimony disproves the pleaded defense and establishes the coercive purpose of the picket. It is difficult to see how coercion, unless expressly admitted, could be more definitely established. Such testimony leaves no room for the position that the picket was placed for the purpose only of imparting information.

In support of their position that the acts of the defendants, if not in the exercise of their right of free speech, constituted an unfair labor practice, counsel in their briefs make much of the fact that upon the hearing on the order

to show cause and to dissolve plaintiff amended its complaint by eliminating the allegation that a purpose of the picketing was to coerce the plaintiff into requiring its employees to join the defendant union. I believe we may agree that to the extent the original complaint alleged a purpose to coerce membership in the union, an unfair labor practice was pleaded but that was but one of the two charges made against the defendants. I believe all parties now agree that if that charge were the only complaint made against the defendants or if it had been retained in the complaint and if the evidence submitted either by the plaintiff or the defendants established the truth of the charge, we would be obliged to say to the plaintiff that its complaint should be dismissed for the state court is without jurisdiction and that plaintiff's exclusive remedy is by application to the National Labor Relations Board for relief. The plaintiff had the legal right to amend and to remove from its complaint all allegations amounting to a charge of unfair labor practice and to base its cause of action upon contentions which do not bring the case within the jurisdiction of the Board. Before the hearing on the order to show cause and motion to dissolve, the complaint was amended and the charge of unfair labor practice was removed as completely as if it had never been mentioned. I cannot agree with counsel for the defendants that the removed allegations retain the potency or importance claimed for them. I do however, agree with the defendants that if the evidence established an unfair labor practice on the part of the defendants, that is, that the picketing was conducted for a purpose condemned by the Federal Act, the complaint should be dismissed upon the ground of absence of state jurisdiction.

Defendants also argue that if coercion was their purpose it would, in the very nature of things, involve more than the execution by the plaintiff of the representation contract; it would continue until organization had become a fact fully accomplished by membership of plaintiff's

eligible employees in the union; that the execution of representation contract would amount to but little; that if we attribute to the defendants the purpose of obtaining the execution of a representation contract, we must also attribute a purpose to do everything to make that contract fully effective. Defendants argue, and their position seems to be sound, that such purpose would amount to a prohibited labor practice. While it may be difficult to believe the defendants could have accomplished organizaiton of plaintiff's store without or that they actually contemplated less than full membership, a finding to that effect would not be supported by the pleadings or the proof. To find that the purpose of the picketing was to intimidate or to coerce membership of plaintiff's employees would be to read into the pleadings an averment not now found and to charge witnesses with a purpose which they disclaimed. All that was ever involved was the execution of the representation contract. While employee membership would in all probability follow, nothing was before the parties except the execution of representation contract. That was all the defendants then sought and execution was all that was required to bring about the removal of the picket as counsel for the defendants state in their briefs. Other actions would likely have followed within a short time but it was evidently the union's position that it would meet or would project but one question at a time. We are now concerned with nothing but the first.

If it was the defendants' purpose to coerce the employees into membership, they had full opportunity to plead and to prove that fact with every right to believe that dismissal of the case would follow the appearance of the fact. But the defendants could not have been expected to do that and to establish so clearly and irrefutably the violation by them of the Federal statute and a clear case against them within the jurisdiction of the Board. In such situation it is understandable why the defendants would invite a finding by the court of an unfair labor prac-

tice which they would hesitate to prove; there is a substantial difference, from defendants' standpoint, between a finding by the court of an unfair labor practice and their intentional proof of it.

As I understand the plaintiff's position it is that the representation contract is not "unlawful" because of inherent illegality either in terms or in operation but because of the manner in which it was sought to bring about its execution; that there was absent that freedom of choice essential to a valid contract; that the defendants relied upon the prospect of ending the financial loss the plaintiff was sustaining with consequent removal of the picket to bring about the execution of the contract. I believe and find that the purpose of the picketing was to divert business from plaintiff's store in such volume and for such indefinite period as would prove to be sufficient to bring about the execution of the representation contract. The manner in which the picketing was conducted was inoffensive but its purpose condemns it.

The evidence discloses that the picketing was successful in that it kept and brought prospective customers out of the plaintiff's store and that the plaintiff sustained substantial loss. I am, however, unwilling to charge the defendants with full responsibility for the amount of plaintiff's reduced volume of trade during the year 1953 or during the period of and immediately following the picketing. In my opinion an award of damages would, as to amount, be arbitrary. The impossibility of proving or determining with even approximate accuracy the damage sustained establishes the inadequacy of the remedy at law and renders injunctive relief proper.

The plaintiff will be granted the injunctive relief it seeks. While it will be found that the plaintiff sustained substantial financial loss or damage no specific sum will be allowed.

Will counsel for the plaintiff prepare, serve upon counsel for the defendants and submit proposed findings, conclusions and decree? In this case the defendants will be given the period of fifteen days within which to serve and lodge objections to proposed findings, conclusions and decree and request for substituted or additional findings and conclusions. I shall then examine the lodged objections, etc., and if I desire to hear counsel shall fix a date therefor at Pocatello.

Dated November 12, 1954.

HUGH A. BAKER,
District Judge.

(ENDORSED:)

FILED FEB. 24, 1955—9:23 AM
SARAH DEVANEY, CLERK, AUDITOR & RECORDER
BANNOCK COUNTY, IDAHO.

Office - Supreme Court, U.S.
FILED
DEC 27 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON,

Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS APPEAL AND BRIEF OF APPELLEE

LEMUEL SKIDMORE
THOMAS M. KERRIGAN
165 Broadway
New York 6, N. Y.

A. D. MERRILL
WESLEY F. MERRILL
Pocatello, Idaho

Attorneys for Appellee

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX

PAGE

Motion to Dismiss Appeal 1

Brief of Appellee on Motion to Dismiss Appeal 3

POINT I—No question of the constitutionality of a state statute is involved, nor was any such question raised by appellants in the State Court, nor passed upon by that court 3

POINT II—The other questions argued in the jurisdictional statement 7

A. The claim of "federal preemption" 7

B. Question of "free speech" 15

Conclusion 19

TABLE OF CASES CITED

American Federation of Labor v. *Swing*, 312 U. S. 321 18
Auto Workers v. *Wis. Board*, 336 U. S. 245 14

Benjamin v. *Foill*, 379 Pa. 540 14
Building Service Employees Int'l Union, Local 262 v. *Gazzam*, 339 U. S. 532 19

Cable v. *Olson*, 52 Ida. 389, 15 Pac. (2d) 737 8
Colgrave v. *Hayden Lake Irr. Dist.*, 40 Ida. 489, 235 Pac. (2d) 434 8

First N'l. Bank of Logan, Utah v. *Colliers, et al.*, 51 Ida. 689, 9 Pac. (2d) 802 8

Garner v. *Teamsters Union*, 346 U. S. 485 .....11, 12, 14
Giboney v. *Empire Storage & Ice Co.*, 336 U. S. 490 .. 19

PAGE

Hughes v. *Superior Court*, 339 U. S. 460 19

International Assn. of Machinists A. F. L. v. *Goff-McNair Motor Co.* (Ark.), 223 Ark. 30, 264 S. W. (2d) 48 1

Int'l Brotherhood of Teamsters Union, Local 309 v. *Hanke*, 339 U. S. 470 19

Morgan Millwork Co. v. *Highway Truck Drivers etc.* (Del.), 112 Atl. (2d) 855 1

Painters' Union (Higbee Co.), 29 L. R. R. M. 1151 ... 1

Poffenroth v. *Culinary Workers Union*, 71 Ida. 412, 232 Pac. (2d) 968 .....

Tarr v. *Amalgamated Association of Street & Electricity Railway & Motor Coach Employees of America*, 73 Ida. 223, 250 Pac. (2d) 904 .....

United Mine Workers (M. F. Fetterolf Coal Co.), 32 L. R. R. M. (Labor Relations Reference Manual) 1028 1

United Workers v. *Laburnum Corp.*, 347 U. S. 656 .. 1

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468 .....11, 1

OTHER AUTHORITIES CITED

Administrative Rulings of the N. L. R. B. General Counsel:

Case No. 106, 35 L. R. R. M. 1246 1

Case No. 840, 33 L. R. R. M. 1037 1

Case No 1133, 35 L. R. R. M. 1533 1

PAGE

Idaho Code, Title 44, Chapter 7:

§ 44-703 ..... 4, 5
§ 44-712 ..... 5, 6

Labor Management Relations Act:

§ 3(d), 29 U. S. C. A. § 153(d) 13
§ 7, 29 U. S. C. A. § 157 10
§ 8, 29 U. S. C. A. § 158 .....10, 11, 12, 13, 14
§ 10(a), 29 U. S. C. A. § 160(a) 9, 10
§ 303 13

28 U. S. C. A. § 1257 .....3, 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON,

Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

Motion to Dismiss Appeal

Appellee moves the Court to dismiss the appeal herein with costs to appellee on the ground that

1. The appeal is not within the jurisdiction of this Court, because not taken in conformity to Statute.

2. That the question of constitutionality of the Idaho Statute, on which appellants base their alleged

right to appeal, was not timely or properly raised, or expressly passed on by the State Court.

3. The judgment appealed from rests on an adequate non-federal basis.

Dated: December 26, 1956.

LEMUEL SKIDMORE
THOMAS M. KERRIGAN
165 Broadway
New York 6, N. Y.

A. D. MERRILL
WESLEY F. MERRILL
Pocatello, Idaho

Attorneys for Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON,

Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF OF APPELLEE ON MOTION TO DISMISS APPEAL

POINT I

No question of the constitutionality of a state statute is involved, nor was any such question raised by appellants in the State Court, nor passed upon by that court.

The notice of appeal (par. I) states that the appeal is taken pursuant to 28 U. S. C. A., §1257, sub-section (2). 28 U. S. C. A. §1257 provides:

"§1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Paragraph III of the notice of appeal states the questions which appellants claim are presented by this appeal. The only question listed in the notice of appeal which it is claimed in any way involves the constitutionality of a State Statute is in paragraph III, subdivision 2 of the notice of appeal, which reads as follows:

"2. Whether Section 44-712, Idaho Code, as applied in this case is unconstitutional (a) as in conflict with the National Labor Relations Act, as amended, or as invading the field which Congress has occupied by the enactment of that statute; or (b) as in violation of the 14th Amendment of the Constitution of the United States."

One of the contentions made by the appellants in the State Courts was that the Idaho Court was prohibited from granting the injunction which was granted in the court below by the provisions of §44-703 of the Idaho Code which provides as follows:

"44-703. *Injunctions—Restrictions on issuance.*—No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any

person or persons from doing, whether singly or in concert any of the following acts: * * *

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;"

The above section is found in Title 44, Chapter 7 of the Idaho Code, which chapter is entitled "Injunctive Relief in Labor Disputes." It was enacted as a single piece of legislation restricting the use of injunctions in labor disputes.

§44-712 of the Act defines a labor dispute as follows:

"44-712. *Labor dispute defined.*—The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

The Idaho Court in the case at bar found that there was no labor dispute under §44-712 of the Idaho Code, and that, therefore §44-703 did not apply.

That the term "dispute", as used in §44-703 means "labor dispute" as defined in §44-712, had been held in prior decisions of the Idaho Supreme Court:

Poffenroth v. *Culinary Workers Union,* 71 Ida. 412, 232 Pac. (2d) 968;

Tarr v. *Amalgamated Association of Street & Electricity Railway & Motor Coach Employees of America,* 73 Ida. 223, 230, 250 Pac. (2d) 904.

The interpretation by a State Court of a State Statute does not raise a federal question. Moreover in the case at bar the State Court held that the State Statute did not apply. Assuming, for the sake of argument only, that the State Statute is unconstitutional, as stated in paragraph III subdivision 2 of the notice of appeal, the State Statute would still not apply, as there would in effect be no State Statute. Even if the State Statute were held to be unconstitutional, as contended by appellants, the decision of the State Court would not be affected.

Furthermore, neither in their brief on the appeal to the Idaho Supreme Court, nor in their assignments of error on that appeal, did the appellants raise or argue the question of the constitutionality of §44-712 of the Idaho Code. The first time that question has been raised, so far as the record shows, was in the notice of appeal to this court from the judgment of the Supreme Court of Idaho.

POINT II

The other questions argued in the jurisdictional statement.

Despite the statement in the notice of appeal basing the appeal on 28 U. S. C. A. §1257, subsection 2, the jurisdictional statement filed by appellants argues that there are questions involved other than the unconstitutionality of the state statute, on which this court should take jurisdiction.

In the jurisdictional statement, appellants in fact did not argue the question of constitutionality, but merely stated that such a question was presented. They apparently assumed that this Court, if it rejected the question of unconstitutionality of the state statute as a ground for appeal, would nevertheless treat the notice of appeal as a petition for a writ of certiorari to review the judgment appealed from, under 28 U. S. C. A. §1257, subsection 3. The granting of a writ of certiorari is, of course, a matter of discretion which, we respectfully submit, should not be exercised in this case.

A

The claim of "federal preemption"

Appellants' claim that the National Labor Relations Board had exclusive jurisdiction is based in part, at least, on the allegations of the original complaint (J. S. p. 5). The complaint, however, was amended at the opening of the preliminary hearing (R. 348-

350). Under the Idaho practice the amended complaint takes the place of the original complaint, which then ceases to have any further function as a pleading. This is so even if a preliminary motion or order has been issued on the original complaint. It is the amended complaint which must be resorted to in determining the issues tendered, the allegations made, and the facts and evidence to be admitted.

> *First N'l. Bank of Logan, Utah* v. *Colliers, et al.*, 51 Ida. 689, 9 Pac. (2d) 802;
> *Cable* v. *Olson*, 52 Ida. 389, 15 Pac. (2d) 737;
> *Colgrave* v. *Hayden Lake Irr. Dist.*, 40 Ida. 489, 235 Pac. 434.

The relative portions of paragraph 5 thereof stated the purpose of the picketing by the defendants as follows (R 350):

> "* * * and for the purpose of intimidating, coercing and compelling the said plaintiff to enter into an unlawful agreement with the defendant union did, on March 31, 1953, place and post pickets immediately in front of the entrance to the premises of the plaintiff, the sole purpose of the defendants in picketing the plaintiff's place of business is to initimdate, coerce and compel the plaintiff to enter into an agreement with the defendant union, all of which is contrary to the laws and public policy of the State of Idaho."

The defendant's amended answer (par. 3) admits that the defendants caused the picketing to take place substantially as alleged in paragraph 3 of the amended complaint, and continues as follows (R. 396, 397):

> "* * * further answering said paragraph, these

> defendants aver that such advertising and picketing initiated and caused by the defendant labor organization was for the proper and lawful purpose of communicating information to and apprising members of defendant labor organization and other members of organized labor affiliated therewith, that plaintiff did not display the Union Store Card, that plaintiff was unfair to organized labor, and that there were other stores in Pocatello, Idaho, which displayed the Union Store Card, and that members of such organizations and affiliates should patronize union stores in Pocatello, Idaho, that displayed the Union Store Card."

Paragraph V of the amended answer denies the allegations of paragraph 5 of the amended complaint and continues as follows (R. 397):

> "* * * and further answering said paragraph 5 these defendants aver, that the intention and purpose of these defendants in so initiating and placing such picket advertising was to avoid the disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor and their affiliates and friends in Pocatello City and vicinity, and to support, protect and maintain such established, prevailing hours, wages and other conditions of employment.

The right of the National Labor Relations Board to grant relief by injunction is based on §10(a) of the Labor Management Relations Act, 29 U. S. C. A. §160(a), which reads as follows:

> "(a) The Board is empowered, as hereinafter

> provided, to prevent any person from engaging in any unfair labor practice (listed in §158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement or otherwise: * * *"

§8 of the Labor Management Relations Act (29 U. S. C. A. §158) defines the unfair labor practices referred to in §10(a).

§8(a) deals with unfair labor practices on the part of an employer and is not involved, since it is the action of the Union as to which complaint was made and proof adduced.

§8(b) deals with unfair labor practices on the part of a labor organization or its agents. A reading of this section shows that there was no unfair labor practice, as defined in that section, either alleged or proved, in the case at bar. This is true whether we take the allegations and claims of the plaintiff or those of the defendants. Neither party either alleged or proved the existence of an unfair labor practice within §8(b).

§8(b)(1) makes it an unfair labor practice for a union to force employees in their right to join or to refuse to join a union or to exercise any of the other rights given them by §7 of the Labor Management Relations Act. There is no issue or allegation in this case of any coercion by defendants of, or attempt by defendants to coerce, the plaintiff's employees. Plaintiff alleged that the purpose of the defendants' picketing was to coerce the *employer* into signing a contract and the State Court so found (R. 440).

§8(b)(2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against employees with respect to hire or terms of employment in order to encourage or discourage union membership. No such conduct was either pleaded or proven in the case at bar. In fact the record shows that no specific form of contract was ever offered to the plaintiff employer. It was merely asked "to sign a contract" and, on its refusal to do so, the events followed which culminated in the defendants placing a picket in front of plaintiff's store.

§8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer and is clearly not involved in this action.

§8(b)(4) makes it an unfair labor practice for a union to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle any goods or commodities or to perform any services, for any of the four objects enumerated in that section. In the case at bar there was no strike, nor any attempt to induce the employees to strike or to do anything else. This §8(b)(4) is primarily the secondary boycott section and does not apply in this case.

Appellants rely mainly upon the decisions of this Court in *Garner* v. *Teamsters Union*, 346 U. S. 485 and *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

In the *Garner* case the complaint charges and the lower court found that the defendant union's purpose

in picketing was to coerce the plaintiffs into compelling or influencing their employees to join the union (p. 487). This was held by this Court to be an unfair labor practice under §8(b)(2) of the Labor Management Relations Act (29 U. S. C. A. §158), on the ground that the plaintiffs had claimed, and the State Court had found, coercion by the defendant union directed against the employees, to influence or compel them to join the union. On the basis of this finding of conduct constituting an unfair labor practice under the Labor Management Relations Act, this Court necessarily applied the rule of "federal preemption". As we have pointed out, no such coercion of the employees was alleged or proved in the case at bar, and there was no finding of any such coercion.

The opinion in the *Garner* case, moreover, at page 488, contains the following statement: "Nor is there any suggestion that respondent's plea of federal jurisdiction and preemption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked."

The National Labor Relation Board has squarely indicated in its decisions that peaceful picketing of an employer for the purpose of gaining or maintaining recognition by him of the union, where no other union has been certified as bargaining agent, is not an unfair labor practice under §§8(b)(1)(A) or 8(b)(2) of the Labor Management Relations Act, and the Board has therefore no power to regulate such conduct, or to grant any relief whatsoever.

United Mine Workers (M. F. Fetterolf Coal Co.), 32 L. R. R. M. (Labor Relations Reference Manual) 1028, 1029;

Painters' Union (Higbee Co.), 29 L. R. R. M. 1151, 1152.

The General Counsel of the National Labor Relations Board, under §3(d) of the Labor Management Relations Act has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under §10" of the Act. The General Counsel has consistently sustained the Regional Directors of the National Labor Relations Board in their refusal to issue complaints charging a union with an unfair labor practice based on picketing for the purpose of recognition.

See *Administrative Rulings of the N. L. R. B. General Counsel*, Case No. 840, 33 L. R. R. M. 1037; Case No. 106, 35 L. R. R. M. 1246; and Case No. 1133, 35 L. R. R. M. 1533.

In the *Weber* case the complaint alleged that the strike called by the defendant union constituted "a secondary boycott under the common law of the State of Missouri" and also was in violation of subsections (A), (B) and (D) of §8(b)(4) of the Taft-Hartley Act, and of §303(a)(1)(2) and (4) of that same Act (Opinion, p. 471). In the face of such affirmative pleading this Court necessarily and correctly held that jurisdiction lay with the National Labor Relations Board. On the other hand, in the case at bar there was no allegation and no proof of any unfair labor practice on the part of the defendant union under the Labor Management Relations Act.

The cases cited by appellants on pages 14 and 16 of the Jurisdictional Statement are distinguishable on the same ground. In *Building Trades Council* v. *Kinard Construction Co.* the complaint alleged that the picketing by defendant was for the purpose of coercing the plaintiff to force its employees to join the union, which the State Court held was an unfair

labor practice under §8(b)(1)(A) and (B) of the Labor Management Relations Act. In *Teamsters Local* v. *N. Y., N. H. & H. R. R. Co.* the amended complaint specifically alleged a violation of the Act, while in *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, the State Court held that the activities of the Union amounted to a secondary boycott, which is an unfair labor practice under §8(b)(4).

The State Courts have interpreted the *Garner* decision as depriving them of jurisdiction where an unfair labor practice under §8 of the Labor Management Relations Act is alleged by either party. Where the pleadings do not show an unfair labor practice the State Courts have assumed jurisdiction and the *Garner* case has been distinguished on that ground.

International Assn. of Machinists A. F. L. v. *Goff-McNair Motor Co.*, 223 Ark. 30, 35, 36, 264 S. W. (2d) 48, 50;
Benjamin v. *Foill*, 379 Pa. 540;
Morgan Millwork Co. v. *Highway Truck Drivers etc.* (Del.), 112 Atl. (2d) 855.

We submit that the conduct of the defendant union in the case at bar did not constitute an unfair labor practice under §8 of the Labor Management Relations Act; that there was, therefore, no remedy by injunction in the National Labor Relations Board, and that the action for injunction was therefore properly brought by the appellee in the Idaho Court.

Auto Workers v. *Wis. Board*, 336 U. S. 245;
United Workers v. *Laburnum Corp.*, 347 U. S. 656.

B

Question of "free speech"

In order to discuss this question, a consideration of the background of the case is necessary. In June, 1952, the union representative, Mr. Lenaghen, saw the store manager, Mr. Dunagan, at the plaintiff's store, indicated that a majority of the store employees desired to join the union, and asked him to sign a union contract. No specific form of contract was ever discussed. Mr. Dunagan replied that this matter would have to be taken up with the Los Angeles office. Thereupon the union filed with the National Labor Relations Board a demand for an election, to which the plaintiff employer consented. In August, 1952, a few days before the date fixed for the election, Mr. Lenaghen was notified by two of the employees that none of the employees would attend the meeting nor vote for the union. The plaintiff's employees were almost all women clerks, several of whom were on a part time basis. The demand for an election was withdrawn by the union, which then filed with the National Labor Relations Board a complaint charging the Newberry Company with an unfair labor practice in that it had "dissipated the union's majority." By this method they hoped to obtain an order granting them rights as a bargaining agent despite lack of a current majority. In August, 1952, also, the Newberry Company was placed on the unfair list of the local Retail Clerks Union and a request was made to the Central Labor Council and the Building Trades Council to place the Newberry Company on their lists, which was done by the Central Labor Council in January, 1953, and by the Building Trades Council in March, 1953 (R. pp. 285, 286).

A hearing was held and on February 24, 1953, the National Labor Relations Board's examiner issued his Recommended Order that the union complaint be dismissed as without foundation. When the union received a copy of this order, it authorized Mr. Lenaghen to place a picket in front of the Newberry store at a time completely within his discretion. The store was not picketed at that time, Mr. Lenaghen testifying that this was because of inclement weather, although on cross-examination he admitted that the weather had not been inclement during the entire period in question. On March 25, 1953, the final order of the National Labor Relations Board was issued. This was received by Mr. Dunagan on March 28, 1953, and by the union at approximately the same time. On March 31, 1953, the picket was placed before the Newberry store. Thus, after exhausting their legal remedies without success, the union took matters into its own hands. No attempt had been made by the union to contact any of the Newberry employees since August, 1952. No attempt had been made to secure information regarding prevailing wages, working conditions in the Newberry store, nor to ascertain if any of the employees employed in June, 1952 were still employed. Three other similar non-union stores in Pocatello were not picketed. There was no occurrence of any kind to explain this sudden activity on the part of the union, except that the union had completely lost its attempt to organize. The inference is clear that the picket was the result of resentment on the part of the union at this loss, and was for no other purpose than to strike back at the Newberry Company, to cause it injury and loss of business, and to use the force of economic coercion to secure what it had not been able to secure by legal means.

It is significant that the picket was placed during the week preceding Easter, normally a period of increased sales, and that the picket appeared during the afternoons, when business was normally at its peak. Pocatello is a strong union town with about 7000 union members in a population of 26,000. The testimony showed a considerable falling off of business during the picketing periods and the Court found that the Newberry Company had been damaged as a result of the picketing, though no damages were awarded, because of inability to determine the amount with accuracy.

The sign carried by the picket was not the usual "unfair" sign, but a special sign with special wording which required considerable discussion, according to Mr. Lenaghen, at the meeting of the union executive board. One side of this sign read:

"Members and Friends of Organized Labor

We Need Your Help

Please shop at stores that display this sign

(Union Store label)"

This was not mere advertising to the public that the Newberry store did not have a union contract. It was a deliberate attempt on the part of the union to create in the minds of the public the impression, by the use of the words "We need your help", that the Newberry store was engaged in a labor dispute with its employees, and that the employees were appealing to the public for help.

In this connection, the testimony of Mr. Lenaghen on the preliminary hearing is significant (p. t. f. 41):

"Q. Now, you not having contacted in any shape, manner, or form the Newberry Company for several months, and they not having contacted you, will you explain to the Court the Union's purpose of placing the picket in front of Newberry's place of business? A. Yes, sir; we were merely trying to advertise to the public a dispute existed with the Newberry Company and their employees."

As to the claim in the defendant's amended answer that the purpose of the picketing was to "avoid disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor in Pocatello and vicinity", the testimony shows that the union had no knowledge as to the existing wage scale and working conditions in the Newberry store, and that, as a matter of fact, the wages paid were the same as, or better than, the union scale.

The Idaho Circuit Court held that the purpose of the picketing was not to inform the public that Newberry's was not a union shop, as contended by the defendant, but was an unlawful purpose i. e., the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the union, and to destroy Newberry's freedom of contracting, and was, therefore, subject to injunctive relief (J. S. p. 9-a).

American Federation of Labor v. *Swing,* 312 U. S. 321 relied on by the appellants is not in point here. The injunction was granted in the case at bar not because the picket was not a Newberry employee, but because the purpose of the picketing was found to

be unlawful and against the public policy of the State. As we have pointed out above, the facts clearly support the finding of an unlawful purpose.

Even where picketing is "peaceful", if its purpose is unlawfully to coerce either employer or employees, the State Court may enjoin it.

Building Service Employees In'l Union, Local 262 v. *Gazzam,* 339 U. S. 532;
Hughes v. *Superior Court,* 339 U. S. 460;
In'l Brotherhood of Teamsters Union, Local 309 v. *Hanke,* 339 U. S. 470;
Giboney v. *Empire Storage & Ice Co.,* 336 U. S. 490.

As this Court stated in the *Gazzam* case, page 537, "this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

CONCLUSION

The motion to dismiss the appeal should be granted and the appeal dismissed.

Respectfully submitted

LEMUEL SKIDMORE
THOMAS M. KERRIGAN
165 Broadway
New York 6, N. Y.

A. D. MERRILL
WESLEY F. MERRILL
Pocatello, Idaho

Attorneys for Appellee